No. 15592

United States
COURT OF APPEALS
for the Ninth Circuit

GLEN TITUS,

Appellant,

vs.

MADAM CADIO G. SIGALAS, et al., owners and PACIFIC ATLANTIC STEAMSHIP COMPANY, Charterer of the SS Santorini, etc.

Appellees.

BRIEF OF APPELLANT

Appeal from the United States District Court for the District of Oregon.

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STEVENS-NESS LAW PUB. CO. 9-57

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JURISDICTION

The jurisdiction of the District Court was based upon this being a suit in Admiralty. Title 28 USCA. sec, 1333.

The jurisdiction of this Court is based upon this being an appeal from the decree entered in that suit. Title USCA, sec. 1291.

Reference is made to the Libel (R. 3), the Answer (R. 8) and the Pre-trial Order (R. 11).

STATEMENT OF THE CASE

Appellant, a longshoreman, was injuring while attempting to escape a swinging cargo boom which broke loose during loading operations on appellee's vessel when a preventer line and a guy line snapped. Appellant contends that the vessel was unseaworthy in that the preventer line was inadequate for the purpose for which it was intended to be used, and because the vessel had only one, instead of two, cleats with which to secure the preventer to the bull rail.

The cause was tried to the Court alone and immediately thereafter the Court rendered an oral opinion in favor of appellant and against appellees. Later the Court withdrew its opinion and took the case under advisement in an Order dated February 6, 1956 (R. 19). Nearly a year later, the Court filed an Opinion dated January 8, 1957, finding in favor of claimants (R. 27), and pursuant thereto Findings of Fact and Conclusions of Law were made and entered on March 4, 1957 (R. 40). A Decree for claimants was also entered at that time and libelant duly filed his Notice of Appeal(R. 47).

SPECIFICATION OF ERRORS

I.

The Court erred in finding the appellee's vessel seaworthy, and more particularly in making the following Findings of Fact and Conclusions of Law:

1. Finding of Fact No. VI (R. 42), because under the evidence the preventer wire was not without defect and was not of proper size and strength for the work for which it was being used.

2. Finding of Fact No. IX (R. 43), because there is no evidence that the angle of the preventer at the pad eye did not cause or contribute to the breaking. On the contrary, the evidence shows that the lack of a second cleat made it necessary to rig the preventer in such a way that an excessive strain was placed upon it at and near the pad eye.

3. Finding of Fact No. XI (R. 43), because the preventer wire was unseaworthy and defective.

4. Finding of Fact No. XII (R. 43), insofar as this Finding implies that an unusual or excessive force was exerted on the preventer by the longshoremen immediately prior to the breaking.

5. Finding of Fact No. XIII (R. 43), in its entirety.

6. Conclusions of Law Nos. II through V, in that they are contrary to the law and evidence.

II.

The Court erred in fixing appellant's general damages in the amount of $5,000.00, which sum is grossly inadequate. Appellant respectfully moves this Court for an award of $15,000.00 general damages should it decide he is entitled to recover. Finding of Fact No. XIV (R. 44).

ARGUMENT

I.

CLAIMANTS' VESSEL WAS UNSEAWORTHY BECAUSE IT CONTAINED AN APPLIANCE INADEQUATE FOR ITS INTENDED USE, NAMELY A PREVENTER WIRE WHICH BROKE DURING USUAL AND PROPERLY CONDUCTED LOADING OPERATIONS.

A concise summary of the facts is necessary to understand the issues in this case.

Appellant was injured while working as a longshoreman aboard the SS Santorini, a Liberty ship, at Coos Bay, Oregon, on February 4, 1955 (R. 76, 113). The vessel arrived in port the day before to load a cargo of lumber and the Independent Stevedoring Company, libelant's employer, was engaged to perform this operation. At about 4:30 p.m. on the day preceding the accident complained of, both the preventer wire and the rope guy holding the starboard boom in place at No. 2 hatch parted because of rust and wear and tear on the preventer (R. 113, 158-9). The ship's Chief Mate, Kyriacos, replaced the broken wire and guy with new lengths from the ship's locker.

During the morning of February 5th, appellant had been working No. 1 hatch. He went to lunch with his gang at 11 a.m. in order to relieve the regular No. 2 hatch gang during the noon hour. The accident occurred during this relief of the gang which had worked the No. 2 hatch for four hours in the morning (R. 77, 78).

At about 12:15 p.m. libelant was performing his

duties as hatch tender at No. 2 hatch while a load of lumber was being hoisted aboard. The port boom was swung out over the dock and the starboard boom was positioned over the starboard side of the vessel. Each boom was held in place by a steel wire preventer and a rope guy. The preventer was rigged from the boom through a pad eye on the bulwark, back through an after pad eye, then back through the pad eyes where it was tied off with a half hitch (R. 101, 103, 105, 114). The rope guy ran from the peak of the boom to the rail at an angle to the preventer and was rigged between two double blocks, one located at the end of the pendant and the other at the end of the strap (R. 92-93, 119, 120). The guy passed between the two blocks three times and on the fourth turn it was tied to the pendant (R. 93).

Cargo runners ran from winches at the foot of each boom through blocks at the peaks of the booms, where they were joined together with a cargo hook. Wire slings were wrapped around the loads of lumber and attached to cargo hook. The loads were then lifted to the ship from the dock. Libelant's Exhibit 8, a motion picture film, illustrates the manner in which the booms were rigged at the time appellant was injured.

At the said time and place, the preventer wire and guy line holding the starboard or offshore boom again parted. Inasmuch as appellant was standing on the port side in the middle of the deck load near the forward edge of the hatch, he immediately tried to avoid the boom and gear swinging toward him, but he slipped to the deck and sustained a broken right ankle (R. 82-84, 99).

Appellant was removed by basket from the ship and was taken to the McCauley hospital in Coos Bay where he was treated. X-rays were taken and a cast was applied after the fracture was diagnosed (R. 85, 86). Appellant was discharged from the hospital on February 11th, but during the course of healing, his right leg became afflicted with severe dermatitis under the cast. On February 22nd, the original cast was removed, the dermatitis was treated, and another cast applied (R. 60-61). Three weeks later it was necessary to replace the cast with a plaster shell that could be removed and put back on by the patient. Libelant was unable to return to work until June 27th, nearly five months after the injury. He is unable to do hold work but he can work the winches (R. 86, 88). While the fracture has healed properly in that the bones are in good alignment, libelant still has some limitation of motion in the ankle, and daily pain and suffering which will be permanent, and a permanent impairment of his capacity to do manual labor. His leg is discolored from the dermatitis, and this condition will be permanent (R. 62-64; 86-90). Libelant's right foot appears swollen as compared with his other foot (R. 88-89).

After the accident to appellant the ship caused two preventers to be re-rigged in place of the one which broke (R. 97-98).

The overriding legal issue in this case is whether appellees' vessel was rendered unseaworthy by reason of a preventer wire which broke while loading operations were being carried on in a normal, usual and customary

manner, without an unusual strain on the wire or an excessive load (R. 91, 106, 109, 110, 111, 126-7).

The record indicates that the wire broke because of a greater pull on the wire than it could stand; metallurgical examination found no evidence of rust or other defect and the expert witness concluded that preventer suffered a simple "tensile break" (R. 136-7).

On the other hand, the evidence is undisputed that the cargo being hoisted at the time of accident weighed at most one and a half tons (R. 106) and was being handled in a prudent and safe fashion (R. 109-11; 126-7). There was no evidence that the longshoremen were engaged in the outlawed practice of "tightlining," that is, setting one winch to pull against the other in order to raise the load higher than usual to clear obstructions. The Court explicitly stated that there was no evidence of "tight-lining" (R. 30-31). Indeed, uncontradicted evidence shows that there was sufficient "drift" in the rigging (R. 109, 126).

If the load was being handled in a safe, prudent manner, if the wire showed no obvious defects, and if it was new and in use for less than a day, what then caused a wire, rated at nearly eight times the tension on it at the time of the break, to give way (R. 139, 140)?

The probable answer is provided by Captain Herman Larsen, one of appellees' expert witnesses. Captain Larsen testified as follows:

MR. WOOD:

"Q. Captain, based on your experience, what is the effect of jerking or over-straining of a wire rope

as to whether the failure or parting of a wire rope always occurs at the moment it is over-strained or whether a series of over-straining can cause a breaking at a later moment?

* * * * *

A. I have found in my experience that a wire and a rope can be damaged by over straining and by jerking and a weakness will later show up where the strain was on the wire or rope.

Q. Under such conditions have you known a wire rope to part under what would be a normal or customary lift?

* * * * *

A. It is quite true and I have found that if a wire rope were damaged and the damage was not detected and then the usual strain was put on it, that could cause it to break." (R. 151-2)

In summary, this is a case where a new wire preventer breaks in normal use without any evidence of defect other than an ordinary "tensile break." The testimony of Captain Larsen makes it clear that the wire became weakened either before use, or during the time it was rigged as a preventer on the SS Santorini. Moreover, the sharp bend of the wire at the pad eye caused by the lack of a cleat with which to secure it may have contributed to the accident (R. 142), for the break occurred at a point about one and one half feet from the pad eye (R. 101, 105-6). Finally, the evidence is that the wire preventer was made of "mild plow steel" rather than "plow steel"—a harder substance—usually used aboard American vessels for this purpose (R. 139, 140, 116-18). These factors undoubtedly related to the breaking of the preventer.

Under this evidence it is clear that the SS Santorini

was unseaworthy as a matter of law in that its preventer wire was defective and weakened at the time libelant suffered his injury.It does not matter that the ship did not, or could not, know of the weakness in the wire, nor is it relevant that the weakness in the wire might have been caused by the acts of the longshoremen engaged in loading the vessel.

> "Thus liability for all damages proximately resulting from any breach of the implied warranty of seaworthiness is imposed by law upon the shipowner, regardless of whether or not the unseaworthy condition aboard the vessel, or indeed the vessel itself, happens to be within the owner's control * * * and regardless of whether or not the defect was known, or in the exercise of due care could have been known to the shipowner. Boudoin v. Lykes Bros. SS Co., supra, 348 U.S. at page 339, 75 S. Ct. 382; The Edwin I. Morrison, 1894, 153 U.S. 199, 210, 14 S. Ct. 823, 38 L. Ed. 688; Lahde vs. Society Armadora Del Norte, 9 Cir., 1955, 220 F. 2d 357, 360."
>
> *Reynolds v. Royal Mail Lines, Ltd.,* D.C. Cal., 1956, 147 F.S. 223 at 227.

In the recent case of *Grillea v. U. S.,* 232 F2d 919, the Second Circuit held in favor of a longshoreman who fell through a hatch whose covers had been improperly laid by the injured stevedore and his companion, only a short time before the accident. The Court stated the applicable law:

> "It may appear strange that a longshoreman, who has the status of a seaman, should be allowed to recover because of unfitness of the ship arising from his own conduct in whole or in part. However, there is in this nothing inconsistent with the nature of the liability because it is imposed regardless of fault; to the prescribed extent the owner is an insur-

er, though he may have no means of learning of, or correcting, the defect. Indeed, as to these it is a kind of 'Workmen's Compensation Act': though limited by the value of the ship and the fact that it only covers injuries caused by the defects that we have mentioned. The following passage from Sea Shipping Co. vs. Sieracki, 328 U. S. 85, 94, 66 S. Ct. 872, 877, 90 L. Ed. 1099 expresses the considerations that lie behind it. The owner

> " 'is in position, as the worker is not, to distribute the loss in the shipping community which receives the service and should bear its cost.
>
> " 'These and other considerations arising from the hazards which maritime service places on men who perform it, rather than any consensual basis of responsibility, have been the paramount influences dictating the shipowners' liability for unseaworthiness as well as its absolute character. It is essentially a species of liability without fault, analogous to other well known instances in our law. * * * It is a form of absolute duty owing to all within the range of its humanitarian policy.' "

232 F 2d 923.

The leading case of *Mahnich v. Southern SS Co.,* 321 U.S. 96, 88 L. Ed. 561, 64 S. Ct. 455, appears to be on all fours with the case at bar. There, a seaman received injuries when he fell from a staging which gave way when a piece of defective rope supporting it parted. The rope was supplied by the mate, and the Court held that the staging "was inadequate for the purpose for which it was ordinarily used * * *." Furthermore, the Court pointed out, "its inadequacy rendered it unseaworthy, whether the mate's failure to observe the defect was negligent or unavoidable." 321 U.S. 103.

Alaska SS Co. v. Petterson, 347 U.S. 396, 98 L. Ed. 798, 74 S. Ct. 601 (1954) reaffirms the absolute, nondelegable duty of the shipowner to furnish a seaworthy hull and appliances as stated in *The Osceola,* 189 U.S. 158, and in *Seas Shipping Co. v. Sieracki,* supra. In *Petterson,* the injured party and his fellow longshoremen rigged a block which had been standing on the deck of the ship. It was of a type used in ship's gear as well as by stevedoring companies. The block was treated by all of the courts as having been brought aboard the ship by the stevedores. While being used in a proper manner, it broke, causing some of the gear to fall and crush Petterson's leg. There was no particular defect found to be the cause of the block breaking. The only evidence was that it was being used properly and it gave way. Mr. Justice Burton in his dissent assumed that the block was defective, and this Court of Appeals in its opinion said:

> "If the block was being put to a proper use in a proper manner, as found by the District Judge, there is a logical inference that it would not have broken unless it was defective—that is, unless it was unseaworthy." 205 F 2d 479.

This Court stated that it did not rely on the negligence concept of *res ipsa loquitur,* but rather, on the fact that the warranty of seaworthiness is a specie of strict liability regardless of fault. Negligence, or control of the instrumentality, by the ship is not a prerequisite for liability. "It is only necessary to show that the condition upon which the absolute liability is determined—unseaworthiness—exists." 205 F 2d 479.

Where the appliance causing injury is being used in

the usual and proper manner, the courts show little concern over the exact reason for its failure. That it did not serve the purpose for which it was intended is the only consideration. This is illustrated not only by the *Petterson* case, but also by later cases such as *Wiel and Amundsen v. Potter,* 228 F 2d 341, decided by this Court, and *Caudill v. Victory Carriers, Inc.,* D.C. Va., 1957 AMC 772.

In *Potter,* this Court held that a rail with an unsecured rod was unseaworthy and imposed liability on the vessel.

The *Caudill* case was an action for personal injuries received by an army stevedore who was injured while descending a Jacob's ladder from the deck of defendant's vessel to a barge. A rope on the ladder parted from fatigue, or wear and tear. The Court held the vessel to be unseaworthy for furnishing such an appliance regardless of who owned or controlled it. Moreover, the Court was unconcerned as to whether the weakness in the rope was obvious or hidden, or known or unknown to the ship.

Reference is also made to *Pope & Talbot v. Hawn,* 346 U.S. 406, 74 S. Ct. 202, 98 L. Ed. 143 (1953), where a carpenter was injured by falling through an open hatch. There was no mention in the Supreme Court's opinion that the shipowner or his officers knew of the opening. The Court held that the vessel was unseaworthy and imposed liability on it.

Thus in the case at bar, all that is necessary for libelant to show is that an appliance was being properly

used, and that it failed. Under *Petterson,* there is an inference that it was defective, and respondent's metallurgical evidence that the wire was not rusted or brittle fails to establish that it was sound; for if it was perfect, why was it unable to handle a load weighing only one-eighth of its tensile strength? The Trial Court, in seeking to pin-point some fault or defect in the wire, ignores the true nature of the warranty of seaworthiness, that it is a liability without fault. It is in the words of the Second Circuit, "a kind of Workmen's Compensation Act."

Ancient law made seamen, and those who do their work, wards of admiralty. The modern applications of this principle recognized the unusual hazards to which men who work on ships are exposed, and with the advent of insurance to spread the risk throughout the community of those who benefit from maritime activity, the Courts of Admiralty have insisted that persons injured by appliances which prove inadequate for the purpose for which they were intended shall have adequate compensation.

In the case at bar, a preventer wire was inadequate for the purpose for which it was intended, and a human being was injured thereby. The vessel was thus unseaworthy and libelant should recover compensatory damages.

II.

APPELLANT'S GENERAL DAMAGES FOR HIS FRACTURED RIGHT ANKLE AND RESULTING PERMANENT IMPAIRMENT OF HIS ABILITY TO WORK, PERMANENT PAIN, AND DISCOLORED SKIN, SHOULD BE ASSESSED AT $15,000.00.

Appellant incurred a serious and painful injury in attempting to avoid the swinging boom after the preventer wire broke. The extent of his injuries are indicated in part by the fact that he was unable to work from February 5, 1955, when he was hurt, to June 27th (R. 86). Appellant still has pain in the ankle every day:

> "Q. Have you ever spent a day since this accident when that foot is free of pain, when you haven't done any work at all?
> A. No." (R. 90.)

During the time the ankle-bone was mending, appellant developed dermatitis under the cast and this has resulted in a permanent discoloration of the skin of the right leg (R. 61-62). Appellant's physician, Dr. Garner, testified that it is probable that within three years appellant will have traumatic arthritis in the affected ankle joint because of the injury to the soft tissue near the break (R. 63). At the present time, appellant still has a limitation of motion in the ankle, swelling, and he cannot do heavy work in the holds of ships (R. 63, 65, 88, 89).

There can be no doubt that general damages should include in addition to past pain and suffering, an allowance toward future pain, loss of future earnings, resulting from an impaired capacity to work, humiliation, em-

barrassment and inconvenience resulting from a stiff, painful and swollen ankle which affects the gait, and a marked discoloration of the skin on appellant's leg. Appellant was 45 years of age at the time of the accident and he therefore had a life expectancy of 25.21 years. That is a long time for a human being to bear the physical and mental effects of such an injury as appellant has suffered. The $5,000.00 found by the Court as general damages amounts to less than $200.00 per year for the rest of appellant's life.

A survey of appellant's injuries must inevitably lead a fair-minded person to the conclusion that the finding of the Trial Court as to his general damages was grossly inadequate. We believe that a figure three times that amount—$15,000.00 would not be an excessive award to appellant.

CONCLUSION

The preventer wire which broke was inadequate for the purpose for which it was properly used. The ship was therefore unseaworthy and the judgment should be reversed. If the Court finds that appellant should prevail, his general damages should be increased to the sum of $15,000.00.

Respectfully submitted,

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FRANK H. POZZI, and
GERALD H. ROBINSON,
Proctors for Appellant.